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Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?

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The plaintiff, Paul, points to the defendant, his former business partner. Paul's voice quivers as he says, "I trusted him. I trusted him and then he double-crossed me. You have no idea what it's like to have someone you trust take advantage of you." Paul leans back, even more visibly angry than before. Both parties turn expectantly to the mediator. The mediator judges that it is important for her to address the plaintiff's feelings immediately. She decides that she wants to try to demonstrate an appropriate level of empathy, allowing the plaintiff to feel heard and understood, while not jeopardizing her neutrality in the eyes of the defendant. She thinks for a moment, and then says, "Paul, it sounds like this has been a very difficult experience for you." She pauses, and the plaintiff nods. After a moment longer, the mediator says, "I can imagine that it must be difficult for you to talk about all of this. I would like to understand the situation better, though. Can you tell me more?"

Scenes like this play out in mediations across the country every day. Mediators constantly face situations in which they must make on-line judgments about how best to respond to parties' statements and actions. As with the story above, mediators' thought processes often go unspoken. Parties generally do not know what mediation-related decisions a mediator has made, and often they are not even aware that she[1] has made any

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[1] As an arbitrary convention for handling potentially vague gender-specific

particular decision at all.

Why would a mediator hide her thought processes and decisions from the parties? For many mediators, the answer lies in a fear that transparent interventions are less effective than nontransparent ones. Indeed, there are many examples of circumstances in which that would be true. In the above scenario, for example, imagine if the mediator had responded to the plaintiff's exclamation by saying the following:

> Okay, I hear a lot of emotion in your voice, Paul, and I'm afraid that if I leave it unaddressed, it will impair our ability to proceed. So what I'm going to do is try to show some empathy by expressing my understanding of your feelings. I hope to make you feel acknowledged, understood, respected and comfortable in going forward with the process. At the same time, I need to make sure that I don't offend the defendant. So, here goes: Paul, it sounds like this has been a very difficult experience for you.

This example of one approach to transparency would clearly make the mediator's efforts at demonstrating empathy less effective. Fears that transparency always produces such disappointing impacts lead many mediators to treat the entire mediation process as a "black box" and to treat their own role as a secretive, almost magical one.

Transparency in mediation is not a simple yes or no decision, but rather encompasses a rich and complex set of questions. The transparency of a mediator's actions depends on whether the mediator shares information with the parties regarding the actions she is taking. There are two categories of information a mediator might disclose. First, she might be transparent about the process she intends to adopt at a given point in the mediation. This "process-transparency" answers the question of *what steps* the mediator is going to take next. In the mediation scenario described above, for example, the mediator might have been process-transparent by saying, "What I'm going to do is try to show some empathy by expressing my understanding of your feelings." The second category of information about which a mediator might be transparent is the impact she intends to create with her actions. "Impact-transparency" addresses the question of *why* a mediator intends to take the actions she is choosing. In the scenario above, an example of impact-transparency would be the mediator's statement, "I hope to make you feel acknowledged, understood, respected and comfortable in going forward with the process. At the same time, I

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pronouns, I will refer to mediators as "she" and to mediation parties as "he" throughout this Article.

need to make sure that I don't offend the defendant."

In addition to depending on the content of the disclosure, transparency's effectiveness also depends on the task about which the information is being disclosed. Within different mediation models, mediators perform a wide range of tasks or functions. Mediators may find it difficult to construct effective, transparent interventions with some of these tasks, such as empathizing. However, when performing other functions, it may actually be *more* effective for a mediator to be completely explicit or transparent about her actions or intent.

This Article examines the question of mediator transparency. It first surveys some of the most popular typologies or categorizations of mediation models developed over the past two decades, noting that none of the models addresses the question of mediator transparency. The Article then examines each of the *kinds* of transparency described above within the context of selected mediator tasks. This analysis suggests that there is no universal best kind of transparency for mediation in general and recognizes that there may not even be a best kind of transparency for specific tasks. Instead, the Article concludes by offering a framework for understanding mediator transparency. Using this framework, the Article suggests that researchers should more carefully examine the question of mediator transparency and that mediators should actively consider appropriate approaches to transparency at different points in each mediation.

I. EXISTING MODELS OF MEDIATION DO NOT ADDRESS THE QUESTION OF TRANSPARENCY

Over the past fifteen years, many scholars have attempted to categorize the various ways in which mediation is practiced. By defining different models, they have sought to describe the kinds of processes mediators adopt and mediators' different attitudes toward their role in a conflict. For example, Robert A. Baruch Bush and Joseph P. Folger contrast "problem-solving" and "transformative" mediators.[2] Kenneth Kressel and his colleagues distinguish between a problem-solving and a "settlement-oriented" model of mediation.[3] Deborah Kolb describes labor mediators as

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[2] *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 55-63, 81-84 (1994).

[3] *See* Kenneth Kressel et al., *The Settlement-Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 68 (1994).

generally either "dealmakers" or "orchestrators."[4] William L. Ury, Jeanne M. Brett and Stephen B. Goldberg suggest that disputes may be resolved through "rights-based," "interest-based" or "power-based" processes,[5] and James Alfini describes three different models of mediator intervention, which he describes as "trashing," "bashing" and "hashing it out."[6] Recently, Leonard Riskin suggested that there are four basic mediator "orientations."[7] There have been many other attempts to reduce the broad range of different mediation practices into descriptive categories or models.[8]

The development of various mediation models and styles has generally helped the mediation community. These different typologies have fostered the development of a more precise mediation vocabulary, enabling scholars and practitioners alike to more effectively frame questions and issues. Some questions that were originally considered ethical issues are now more typically treated as questions of style or approach.[9] Well-defined models

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[4] *See* DEBORAH KOLB, THE MEDIATORS 23–45 (1983).

[5] *See* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 4–5 (1988). *See also* Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law*, 1997 J. DISP. RESOL. 56 (1997) (contrasting rights-based and interest-based models of mediation).

[6] *See* James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991).

[7] *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). These orientations are "evaluative-narrow," "evaluative-broad," "facilitative-narrow" and "facilitative-broad." They stem from plotting mediators along two separate continua: "problem-definition" and "facilitative-evaluative." Under the evaluative-narrow orientation, a mediator would define the problem in terms of positions, urge settlements based on positions and provide evaluation consistent with positions. An evaluative-broad mediator focuses on parties' broadly-defined interests and proposes and evaluates options based on that understanding of interests. Facilitative-narrow mediators assist the parties in evaluating proposals narrowly and encourage further exploration of specific, narrow issues. Finally, facilitative-broad mediators help parties evaluate options for themselves, using broadly defined sets of interests instead of narrow positions. *See id.* at 25–34 (providing a graphical illustration of this categorization). *See also id.* at 35.

[8] For a more complete treatment of different models which have been developed, see, e.g., *id.* at 13–16.

[9] There remain, however, some practitioners and scholars who believe that this trend toward inclusiveness within the mediation community is potentially harmful. *See, e.g.*, Susan S. Silbey, *Mediation Mythology*, 9 NEGOTIATION J. 349 (1993). For

also enable scholars and practitioners to observe more carefully some of the choices that mediators make during a mediation session. For example, at one point a question within the mediation community focused on the issue of whether it is appropriate to introduce law into a mediation. Typical responses to such a question generally paralleled the debate of the relative merits of facilitative and evaluative mediation. Today, with that distinction clearer, scholars can ask more precise and practical questions, such as, "Within a facilitative model of mediation, what is the most effective way for a mediator to introduce the law?"[10] These models also make it easier for the public, the prospective consumers of mediation services, to understand that many different types of interventions are currently labeled "mediation."[11] This knowledge helps promote more effective matches between mediation participants and mediators.[12] While no typology has yet fully described the range of mediator behavior to the complete satisfaction of the mediation community, the existence of these models unquestionably increases understanding and scholarship.

One likely reason why none of these models has yet been universally embraced by the mediation community is that none of the proposed typologies adequately describes or guides mediators through the range of difficult decisions they must make during a mediation. For example, although it may be useful for a mediator to consider the degree to which she plans to play a "facilitative," as opposed to an "evaluative," role,[13] this decision will not provide her much guidance in the decision of whether to conduct early meetings in joint session or in private caucus. A facilitative or an evaluative mediator could select either approach.[14] Similarly,

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them, there is a single vision of what constitutes appropriate mediator conduct. *See also* DEBORAH KOLB, WHEN TALK WORKS 459–461 (1994).

[10] For an extensive treatment of the issues raised by the introduction of law into a mediation, see generally Kurtzberg & Henikoff, *supra* note 5.

[11] Efforts to describe and define mediation narrowly or simplistically do not truly serve the interest of educating mediation consumers. *See* Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOTIATION L. REV. (forthcoming 1997).

[12] This was among the primary goals of the development of Leonard Riskin's four quadrant typology. *See* Riskin, *supra* note 7, at 38–48.

[13] This decision is described in Riskin, *id.*, at 23–24.

[14] Christopher Moore, for example, notes that mediators may caucus with parties for a wide range of different reasons, including "develop[ing] settlement alternatives" with the party, "determin[ing] if an acceptable bargaining range has been established," "design[ing] proposals or offers that will later be brought to joint session" and "possibly

although it is important for a mediator to have some understanding of the degree to which she plans to define the disputants' problems narrowly or broadly,[15] this understanding will not help her decide how to handle issues like a perceived power imbalance between the parties.[16] Mediators wrestle with many difficult questions during the course of a mediation, a substantial number of which are not addressed by any of the existing models or typologies.[17]

One decision which frequently faces a mediator is the question of whether to be transparent with the parties about the actions she is taking. This question arises regardless of which "mediation model" the mediator has adopted. Many mediators and scholars treat mediation within any model as if it were a black box or a kind of magic show in which the mediator "does her thing" for or to the participants without explaining what "her thing" is or how or why it is expected to work. Indeed, some mediators treat their role like that of a magician's, avoiding explanations as if they were secrets that would ruin the effects of their efforts.

Within mediation literature, very little discussion exists about what parties should know and understand. Much of the current work does not adequately address the ongoing decisions mediators make about the nature of their interventions. Mediation literature often advises mediators to

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mak[ing] suggestions for settlement options." CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 319-325 (2d ed. 1996).

[15] Problem-definition is the second of Riskin's two continua. *See* Riskin, *supra* note 7, at 18-23 (describing possible levels of breadth in defining the problem in a mediation). Bush and Folger argue that by framing the mediation as a problem to be solved, regardless of the breadth of that problem, results in the potentially destructive introduction of a third party into that problem-the mediator. *See* BUSH & FOLGER, *supra*, note 2, at 63.

[16] For a brief description of processes some mediators use to handle perceived power imbalances between the parties, see MOORE, *supra* note 14, at 333-337.

[17] Robert A. Baruch Bush described the following two kinds of dilemmas for mediators: (1) skills dilemmas, those in which "the mediator is unsure of how to effectuate the course of action she wants to pursue" and (2) ethical dilemmas, "where the mediator knows how to effectuate the course of action but is unsure of whether it is proper to do so at all." ROBERT A. BARUCH BUSH, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS 6 (1992). Even under Bush's construction, the selection of a mediation model does not necessarily resolve either kind of dilemma, and both kinds of dilemmas can be raised within any model.

"educate the parties about the process and gain their commitment to try it."[18] Yet the typical discussion of the mediation process is generally described as a very narrow conversation at the beginning of the mediation regarding how the parties and mediators will structure their interaction. This narrow treatment of mediation process implies that once the decision on a process is made at the outset, no further procedural decisionmaking is necessary. Instead, the mediator and the parties simply set out to do the process they have agreed upon. For example, in his lengthy treatment of a standard mediation process, Christopher Moore devotes only two paragraphs to the education of parties regarding process. In that discussion, he treats process decisions entirely as an up-front proposition, noting that:

> Mediators occasionally take an active educational role before joint sessions to prepare disputants for what is likely to occur. The goal is to obtain the commitment of the parties to the procedure before joint session. Other mediators make their procedural proposals or suggestions during the first session and assume that they will be accepted or that alternative procedures will be negotiated with disputants.[19]

In practice, mediators are constantly challenged to effectively respond to changing situations. Although they continually make various procedural decisions, mediators generally only alert and educate parties about a narrow set of decisions. Ironically, the silence that pervades mediation rooms across the country regarding process decisions is paralleled by a concomitant lack of discourse within mediation literature.

Though mediation scholarship does not address the question of mediator transparency directly, much of it tacitly suggests that mediators should *not* be transparent with the parties. For example, in a model opening statement, Moore suggests that mediators tell parties, "I may ask some clarifying questions or probe your description so that I can gain a greater understanding of how you perceive the situation."[20] Moore later suggests that mediators should, in fact, do far more than just "clarify" or "probe" to gain a greater understanding of party perceptions. He suggests that mediators *tell* the parties they are seeking a "greater understanding," while in fact they try to perform tasks such as (1) reframing or summarizing party statements, (2) focusing discussion on potentially productive areas, (3)

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[18] MOORE, *supra* note 14, at 159.

[19] *Id.* at 160.

[20] *Id.* at 199.

"minimiz[ing] the psychological damage resulting from emotional exchanges," (4) promoting a "positive emotional climate," (5) "fractionating" large points raised during the mediation and (6) demonstrating nonpartisan empathy.[21] Each of these activities is considered to be an important part of a mediator's response to parties' initial statements. It is not uncommon, however, for mediators to avoid any discussion of these activities with the parties. The gap between what a mediator *explains* to the parties and what she tries to *do* with, to or for the parties is often wide. This reluctance toward transparency is reflected both in the existing prescriptive mediation literature and in the current lack of descriptive research focusing on this question.

There is currently no adequate research or analysis on mediator transparency, yet the question is an important one for practitioners and scholars alike. The substantial body of mediation models has largely ignored the question of mediator transparency. However, this does *not* suggest that the mediation community needs another set of mediation models. Instead, transparency should be treated as a question which transcends mediation models. Many practitioners now agree that there is no single best model of mediation for all circumstances.[22] A thorough examination of mediator transparency yields a similar understanding: no single best kind or level of transparency for all circumstances exists. Instead, mediators and scholars should recognize that transparency raises a complex set of questions. This Article and the framework it proposes represent a beginning in the process of understanding these questions.

II. THE EFFECTS OF TRANSPARENCY DEPEND ON THE MEDIATOR TASK IN QUESTION

Although it is not possible to identify a universal best kind of transparency for all circumstances, the effects of transparency are not completely unpredictable. Factors such as a mediator's personal style or the characteristics of the parties have some impact on the effectiveness of transparent activities. The most significant variables, however, in determining the impact of transparency are (1) the kind of transparency contemplated, and (2) the nature of the mediator task involved. As noted

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[21] *Id.* at 209-210.

[22] *See, e.g.*, Riskin, *supra* note 7, at 12-13. *But see, e.g.*, Kimberlee K. Kovach & Lela P. Love, *"Evaluative" Mediation is an Oxymoron*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31, 31-32 (1996) (discussing the pitfalls of evaluative mediation).

above, there are two different, basic things about which a mediator may be transparent—process and impact. Process-transparency involves explaining the steps that a mediator intends to adopt at a given point in a mediation. Impact-transparency involves communicating the effects that the mediator is hoping to produce in the parties by taking those steps. The number of mediator *tasks*, on the other hand, is nearly limitless. Mediators are asked to perform a wide range of tasks or functions for parties throughout the life of a mediation. Some of these tasks or functions are specific to particular models of mediation.[23] However, others are performed within the context of many different models of mediation. Because mediators can perform such a diverse range of functions, it is most useful to analyze the effects of mediator transparency within the context of specific mediator tasks.

Each of the next three sections of this Article focuses on one particular *kind* of mediator transparency. The first section examines nontransparency, the second examines process-transparency and the third examines impact-transparency. However, as noted above, it is not useful to consider different kinds of transparency simply in a vacuum. Their effectiveness is highly dependent on the particular task in question. Therefore, for each type of transparency, the Article isolates a different mediator task in which to analyze it. The selected mediator tasks clearly do not represent the full range of tasks in which mediators engage. The list of tasks analyzed is neither comprehensive nor representative. Instead, the tasks were chosen because they help to illustrate the potential effects of different kinds of transparency. It would be possible to conduct a similar analysis on a virtually endless list of mediator functions. However, the focus of these sections is a more thorough understanding of the dynamics created when a mediator adopts a particular kind of transparency.

III. NONTRANSPARENCY: THE EXAMPLE OF EMPATHY

Mediators typically avoid transparency. Within a nontransparent approach to a particular task, a mediator tells the parties neither what actions she is going to take nor for what purpose she has decided to take them. This section will examine some of the dynamics created by nontransparent approaches in the context of mediators' efforts to

[23] For example, having the mediator tell the parties her assessment of "the strengths and weaknesses of their positions and the likely outcome of litigation" is a mediator task that is specific to models of mediation which are evaluative rather than facilitative. Riskin, *supra* note 7, at 26.

demonstrate empathy with the parties.

A. *The Role of Empathy in Mediation*

Mediators often feel that it is important for them to demonstrate empathy with the disputing parties. In a recent article exploring the role of empathy in the context of negotiations, Robert Mnookin, Scott Peppet and Drew Tulumello describe empathy as containing the following two separate components, each of which is necessary to effectively demonstrate empathy: "perspective-taking" and "active expression."[24] The first component is the capacity to understand the point of view of the "other side," a skill that psychologists call perspective-taking.[25] This perspective-taking component involves no judgment or prejudice with regard to the view of the other side. Instead, it merely describes an activity in which the empathizer attempts to "becom[e] thoroughly at home in" the other's perception of the world.[26] Empathy requires neither agreement with the other person's views nor compassion for his circumstances. Instead, according to psychologist Heinz Kohut, empathy is a "value-neutral mode of observation."[27] It involves understanding the other person "as if one were the other person, but without ever losing the 'as if' condition."[28] The second component of empathy is the visible component. It involves an active expression or demonstration of nonjudgmental expression.[29] Effective empathy, then, combines a thorough, accurate understanding of the other side's perspective *and* an articulate demonstration of that understanding.

Negotiators can derive considerable benefits from demonstrating empathy. Douglas Stone suggests that the process of empathizing can cause

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[24] *See generally* Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217 (1996).

[25] *See id.* at 219.

[26] CARL ROGERS, A WAY OF BEING 142–143 (1980).

[27] Heinz Kohut, *Introspection, Empathy, and the Semicircle of Mental Health*, *in* 1 EMPATHY 81, 84 (Joseph Lichtenberg et al. eds., 1984).

[28] G.T. Barrett-Lennard, *The Empathy Cycle: Refinement of a Nuclear Concept*, 28 J. COUNSELING PSYCHOL. 91, 92 (1981) (citing Carl Rogers, *A Theory of Therapy, Personality, and Interpersonal Relationships as Developed in the Client-Centered Framework*, *in* 3 PSYCHOLOGY: A STUDY OF A SCIENCE: FORMULATIONS OF THE PERSONS AND THE SOCIAL CONTEXT (Sigmund Koch ed., 1959)).

[29] *See* Mnookin et al., *supra* note 24, at 219.

others to become more open themselves to mutual understanding.[30] Through this process, Stone suggests, a person can increase his persuasiveness by demonstrating empathy.[31] Others have suggested that the thorough understanding that stems from good empathy can help not only in the integrative, value-creating aspects of negotiation, but also in conducting distributive or value-claiming activities.[32] While not all negotiators exhibit behavior suggesting that they value empathy as part of their negotiating repertoire, many agree that empathy contributes significantly to a negotiator's effectiveness.

In addition to the benefits it confers on disputants, empathy assists mediators in a number of ways. First, as Mnookin, Peppet and Tulumello note, "the best negotiations are those in which each disputant can both demonstrate a nonjudgmental understanding of the needs, interests and concerns of the other and also effectively assert her own. . . . One goal of a mediator, therefore, could be to help each party both assert and empathize."[33] A second advantage of expressing empathy is that such expression may enable mediators to re-create many of the same benefits which empathetic negotiators enjoy. That is, a mediator's expression of empathy may have effects that are similar to those which occur when empathy is demonstrated by an opposing disputant. In that case, mediators are able to accomplish things like avoiding attributional errors and relationship-based problems.[34] Another benefit to mediator empathy is that it often enables disputants to become better prepared emotionally for the rest of the mediation process. Mnookin, Peppet and Tulumello assert that "[t]he subtext to good empathy is concern and respect, which diffuses hostility, anger and mistrust, especially where these emotions stem from feeling unappreciated or exploited."[35] Many scholars and practitioners view this kind of emotional preparation as essential.[36] A final benefit for

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[30] *See* Douglas Stone, On Listening 5-6, 11 (Dec. 1994) (unpublished manuscript on file with author).

[31] *See id.* at 8-10.

[32] *See* Mnookin et al., *supra* note 24, at 219-220.

[33] *Id.* at 228.

[34] *See id.* at 220.

[35] *Id. See also* NICHOLS, THE LOST ART OF LISTENING 10 (1995) (stating that "[w]hen . . . feelings take shape in words that are shared and come back clarified, the result is a reassuring sense of being understood and a grateful feeling of shared humanness with the one who understands").

[36] *See, e.g.*, MOORE, *supra* note 14, at 210 (providing that "[i]nterventions related to promoting a positive emotional climate include . . . [a]ccepting the expression of

mediators who choose to demonstrate empathy is the potential that their behavior will serve as a model for the parties.[37] In the process of facilitating negotiations between parties, many scholars and practitioners consider it important for mediators to demonstrate empathy.

B. *The Nontransparent Approach to Empathy*

While there is no universally accepted best way to empathize, mediators typically treat empathizing as an activity best done without any kind of transparency. Nontransparent mechanisms for attempting to empathize with visibly upset disputants often closely resemble the first intervention by the sample mediator in the dialogue at the beginning of this Article. In that case, the mediator's nontransparent response to Paul, the angry plaintiff, included the statement, "Paul, it sounds like this has been a very difficult experience for you." Another common nontransparent effort would be something like, "I imagine that this has been a very difficult experience for you, Paul." Neither of these statements requires that the speaker agree with Paul's substantive views. Neither even requires that the empathizing mediator hold any sympathy or effective response for the disputant in question.[38] Yet, both of these statements help to communicate to Paul that the mediator has recognized some of the impacts of the current situation *on Paul*.[39] The mediator's explicit recognition of Paul's emotional experience also demonstrates "concern and respect" for Paul's emotions.[40] This can help ease emotional tensions.[41] Furthermore, because the specific nontransparent responses do not communicate agreement with Paul in any

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feelings and being empathic, though not taking sides"); *see generally* BUSH & FOLGER, *supra* note 2.

[37] *See* Mnookin et al., *supra* note 24, at 228.

[38] *See id.* at 219.

[39] Neither of these statements makes an explicit invitation to Paul to correct any misperception which the mediator may have. That is, the mediator has not provided explicit space for Paul to say, "No, it hasn't been difficult—it has just been frustrating" or some other correcting statement. An inaccurate, or potentially even an accurate, empathetic statement without any opportunity for confirmation or correction may communicate to the target that the would-be empathizer does not truly *desire* to understand. If this happens, much of the positive impact of empathy will be lost. *See* SHAWN CHRISTOPHER SHEA, PSYCHIATRIC INTERVIEWING: THE ART OF UNDERSTANDING 17 (1988); Stone, *supra* note 30, at 6 n.13.

[40] *See* Mnookin et al., *supra* note 24, at 220.

[41] *See id.*

way, they do not color the defendant's perception of the mediator's impartiality.

C. *Other Approaches to Empathy*

The tendency to view empathy as a task best accomplished through nontransparent means is so strong that some mediators simply ignore other possible approaches. It is important, however, for mediators to understand what impacts transparency would yield and why. To explore the effects of transparency, the following section examines both impact-transparency and process-transparency in the context of empathy.

In the context of empathizing, a number of obstacles render the effective use of impact-transparency difficult. For example, it is nearly comical or tragic to imagine a mediator responding to an angry disputant by saying, "I can tell you're upset, and I'm hoping that following my intervention, you'll be less inclined to have angry outbursts like that again. Here goes: Paul, it sounds like this has been a difficult experience for you." Part of the problem with this statement lies in the mediator's abysmal word choice. A portion of the difficulty may also lie in the very nature of impact-transparency. Articulating the intended impact of empathizing statements jeopardizes many of the basic goals of empathy. One explanation for the lack of effectiveness of the impact-transparent approach may stem from the mechanics of empathy itself. Psychologist Carl Rogers argues that in a therapist-patient relationship, it is more important that the patient believe that the therapist has a *desire* to understand than it is for the therapist to actually have a full understanding.[42] Assuming this is true, then efforts at empathy that justify the process of seeking to understand in terms other than simply desiring to understand may be counterproductive. This suggests that even if the mediator were more artful in her impact-transparent phrasing,[43] she would still face considerable challenges if she

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[42] *See* CARL ROGERS, ON BECOMING A PERSON 44 (1961).

[43] For example, a mediator could say something like:

> I want you to feel heard and respected. I also hope that you'll be able to move away from your current, highly aggressive and emotional stance toward one which would permit you to continue with this mediation in a productive way. It sounds like this has been a difficult experience for you, and I imagine that this must be difficult to talk about.

This statement would not avoid all of the potential pitfalls of transparency,

adopted this approach.

Transparency regarding the process of empathizing does not create the same set of risks as transparency regarding impact. A mediator adopting a process-transparent approach might say, for example, "I'd like to tell you what I imagine you are feeling right now. Please help me understand if I've gotten it wrong. It sounds like this has been a frustrating experience for you." This process-transparent approach may make the party feel heard and respected without destroying the potential benefit by justifying the mediator's actions with reference to a target product or impact. In this way, a mediator who adopts a process-transparent approach to empathy may not invite the same understandably hostile response created by the impact-transparent approach to empathizing.

IV. PROCESS-TRANSPARENCY: THE EXAMPLE OF "REALITY TESTING"

A. *Reality Testing Parties' Alternatives to Mediation*

Many mediators feel that it is part of their responsibility to help the parties assess the risks and benefits of failing to settle through mediation. This is commonly referred to as "reality testing,"[44] but for at least two reasons, this term is not a very useful description of the process often used. First, the phrase implies that an objective reality exists and suggests that the mediator somehow has access to that reality in a way the parties do not. This concept of a single, "objective reality" runs counter to most mediator efforts to encourage the parties to accept as plausible *more* rather than fewer views of what is right.[45] Second, the word "testing" inaccurately

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but it would likely be more effective than the example given above.

[44] *See, e.g.*, KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 25–26 (1994); David Hoffer, Mediating at Two Tables 18 (1996) (unpublished manuscript on file with author).

[45] Too often, when two parties engage in a conversation aimed at determining which of the two holds the (single) correct answer, inquiry is replaced with advocacy designed to "win the argument." This kind of advocacy prevents either party from learning more than he already knew at the beginning at the conversation, and in fact, it may inappropriately reinforce each party's perception that he was "right" all along. *See* PETER M. SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 198–202 (1990). One strategy a mediator may adopt to avoid this dynamic is to encourage parties to share observable data in addition to (or even instead of) their pre-determined conclusions. This requires a shift from the notion of a single

describes the range of processes available to mediators who seek to help parties understand their alternatives to mediation. To the extent that it suggests that the mediator must grill the parties into seeing—or at least accepting—lesser views of their alternatives, it is an overly narrow description.[46] There are viable methods of reality testing which do not include such processes.

A more accurate and useful name for the process of helping parties assess their prospects outside of mediation would be something like "BATMA-checking." The term BATNA (Best Alternative to a Negotiated Agreement) is now commonly accepted by many negotiation and mediation scholars.[47] In describing common negotiation dynamics, Roger Fisher, William Ury and Bruce Patton distinguish between "options" and "alternatives." Options, in their vocabulary, are those ideas that could be part of an agreement between the negotiating parties. Alternatives are those actions which a party can take without the consent of the other party. These authors advise negotiating parties to compare any possible option or option package with their Best Alternative to a Negotiated Agreement (BATNA).[48] In most negotiations, a party compares—consciously or unconsciously—the value of a proposed settlement with his estimate of the value of his BATNA. Often, a party will believe that his BATNA lies in litigation. In the context of a mediation, the dynamic is similar: parties generally compare potential options or option packages with their BATMA.[49]

"reality" because it recognizes that each party is likely to have observed, recalled and processed information differently. *See* CHRIS ARGYRIS ET AL., ACTION SCIENCE 243–247 (1985).

[46] Some mediators use the term reality testing in reference to a completely different activity. For those mediators, reality testing involves assessing and evaluating the viability of potential settlement options. For reasons similar to those stated above, the designation reality testing is also not particularly helpful for these processes either.

[47] *See, e.g.*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 45 (1982) (adopting the designation BATNA).

[48] *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97–102 (2d ed. 1991).

[49] Some mediation scholars treat the party's BATNA, as if it were equivalent to the party's BATMA. In many cases, this distinction is virtually nil. However, in some cases a party may have a reason to view the prospects of a mediated settlement differently than the prospects of a settlement negotiated without the assistance of a mediator. In some cases, the presence of a third party may make it easier (e.g., less politically costly or more easily explainable) for a party to accept a particular settlement than it would be for the party to accept an identical agreement through unfacilitated

Because parties are only likely to settle if they believe the value of a possible option or option package to be greater than their BATMAs, many mediators find it important to spend time with parties making sure that they have properly considered their BATMAs. There are at least two scenarios in which mediators may feel the need to focus parties' attention on their BATMAs. First, mediation parties may have given very little, or no thought to the question of their BATMAs. Second, one or both of the parties may have not estimated their BATMAs appropriately.

In some cases, parties that have not considered the likely result of a no-agreement mediation can significantly impair the quest for settlement.[50] If a party has not estimated the value of his BATMA, it is very difficult to persuade that party that the option or options on the table are more

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negotiations. It may even be that a mediator would be able to counteract some psychological phenomena such as reactive devaluation in the parties that would otherwise prevent settlement. *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution, in* BARRIERS TO CONFLICT RESOLUTION 38–42 (Kenneth Arrow et al. eds., 1996); Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 22–26 (1996). In other cases, the presence of a third party may make it harder for parties to arrive at a settlement because they create an audience which will make parties less inclined to come to resolution. It is not always easiest for parties to settle their disputes with others watching. For example, the author of this article observed one lengthy construction mediation in which the parties ultimately requested that the *mediator* leave the room for a few minutes. During that parties-only caucus, the parties settled the case and dismissed the mediator. For this reason, mediators must be open to the possibility that a party's BATMA, rather than his BATNA, is most relevant. The mediator's question should be, "What will this party do if there is no mediated agreement?" and not "What will this party do if there is no agreement?"

[50] Marjorie Aaron notes that in some cases, "one or both of the parties have simply failed to evaluate the trial alternative at all. Their settlement positions reflect what they might want or need, but not what they anticipate a reasonable person would pay based upon what is likely to happen at trial." Marjorie Corman Aaron, *Evaluation in Mediation, in* MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 272 (1996). Aaron's analysis makes the assumption that litigation represents the BATMA for at least one of the two parties *and* that the expected value of a trial represents the full accounting of how a party would evaluate that alternative. In many cases, parties may (1) have other alternatives than trial or (2) consider how a range of interests are impacted beyond simple monetary considerations. In any case, though, Aaron is correct in noting that parties often arrive at the mediation table without having considered what will happen if there is no agreement.

attractive than anything he can get by walking away.[51] In other cases, a party's ignorance of his BATMA may induce inappropriate settlement. Critics of mediation often target the manner in which the process relies on parties to represent themselves effectively without any structural or procedural safeguards. Parties who have never even considered legal remedies, for example, may forgo legal entitlements for an agreement that offers them far less than they could have gotten in court.[52] While some mediators would argue that this is the nature of self-determination, many scholars argue that this impact violates the principle of informed consent.[53] Whether it promotes or hinders settlement, many mediators find it appropriate to spend time making sure that parties have at least recognized that they have alternatives outside of mediation.

Even when parties are aware that they have non-mediation alternatives, mediators often believe that parties have not properly estimated their BATMAs. In those cases, as above, the situation is problematic regardless of whether the party has overestimated or underestimated his BATMA. When parties overestimate their BATMAs (for example, each believing that they will receive far more through litigation than the mediator believes is likely), they may effectively destroy any zone of possible agreement. Without such a perceived zone or any mechanism for creating such a zone through value creation, mediators will be unable to create a condition in which the parties consider settlement to be superior to their BATMAs. If,

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[51] *See* Frank E.A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 59 (1994); Hoffer, *supra* note 44, at 123–124.

[52] For example, within the housing context, it is often the case that landlords will possess a far greater understanding of the legal remedies available than will tenants. Even in states with pro-tenant statutes, it is often the case that tenants will agree to mediated agreements that are inferior by some external measure to those available through court. *See* Kurtzberg & Henikoff, *supra* note 5, at 62–65; Erica Fox, Note, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOTIATION L. REV. 85 (1996). The risk that uninformed or disadvantaged parties will settle for less than they might receive through litigation forms the basis of a number of critiques of mediation generally. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991).

[53] *See, e.g.*, BUSH, *supra* note 17, at 15, 19–23 (describing the question of introducing law into a mediation as a situation in which the principles of informed consent and self-determination come into tension); *see also* Henikoff & Moffitt, *supra* note 11 (arguing that the introduction of law into a mediation may impact on the principles of informed consent, self-determination and neutrality).

on the other hand, one of the parties has severely underestimated the strength of his BATMA, the mediator may be faced with a situation in which one party is unknowingly sacrificing a legal right or entitlement. In either case, many mediators consider it important to spend time with the parties measuring and calibrating their sense of what is likely to happen if there is no mediated settlement.

B. *The Process-Transparent Approach to Reality-Testing*

A mediator can be process-transparent in her efforts to check the parties' assessments of their possible walkaway alternatives. For example, when faced with a party whom she believes has misestimated the strength of his BATMA, a mediator could say:

> You've said that you think you have a 50-50 shot of winning in court, and I'd like to spend some time on that. Specifically, I'd appreciate it if you would explain to me how you calculated your chances on the following three issues: the jurisdictional challenge, the assertion of collateral estoppel and the admissibility of the second auditor's report.

With this statement, the mediator has revealed information to the party about the process she intends to follow (having the party explain probability assessments at different possible stages of litigation).[54] A process-transparent approach to BATMA-checking permits the mediator to be clear with the parties about the role she intends for them to play. Through process-transparency, a mediator may also be able to set the parties' expectations about the mediator's contributions with respect to BATMA-checking. Some mediators are reluctant to provide their own assessments of parties' litigation alternatives. Others consider such input as central to the contribution they make to the parties' settlement efforts.[55] In either case, a mediator's contributions will be more effective if the parties understand the

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[54] This approach would not be adopted by all mediators or by all mediation models. However, decision analysis depends on such information. For more on the application of decision analysis in the context of mediation, see Marjorie C. Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEGOTIATION J. 123, 123-133 (1995); David P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOTIATION L. REV. 113 (1996).

[55] The question of whether mediators should play an active evaluative role for parties is one of the open issues addressed by several existing models of mediation. *See, e.g.*, Riskin, *supra* note 7, at 44-46. It is outside the scope of this Article.

mediator's role in advance. Process-transparency is the vehicle by which the parties can arrive at that understanding.[56]

One potential risk of process-transparency in the context of BATMA-checking is that some mediators may feel that this approach limits their capacity to respond creatively to the needs of the parties. Process-transparency sets the expectations of the parties, allowing them to develop a clearer sense of their own roles within the mediation. However, this clarity has a price. Established process expectations can limit the kinds of responses a mediator can adopt as she helps the parties to analyze their BATMAs. In the example above, for instance, having laid out the process she intends to follow, a mediator might feel compelled to proceed with the analysis of all three issues even if the original purpose behind the BATMA-checking was served after the first decision node. Similarly, parties may distrust the motives of the mediator even more in a situation in which she announces a process and then deviates from it than if the mediator says nothing at all about the process.

C. *Other Approaches to Reality Testing Parties' Alternatives to Mediation*

As with many tasks, mediators often engage in BATMA-checking without being transparent in any way. One common example of nontransparent BATMA-checking occurs when a mediator meets with one party privately and asks, "What do you plan to do if this case does not

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[56] Many mediator efforts at BATMA-checking risk creating suspicion and misattribution in the targeted parties even when they include some degree of process-transparency. In the above example, the mediator is transparent about the fact that she intends to survey the likely outcomes of three different possible stages in litigation. While it may be useful for a mediator to provide this kind of overview to the parties in advance of the exercise, nothing in the mediator's statement revealed anything about the mediator's motivation for selecting these particular stages for analysis. It is reasonable to imagine that the parties will try to guess why the mediator chose these three stages (and not, for example, other issues which would certainly arise), and there is considerable risk that they will inaccurately assume that they understand the mediator's motivations. One obvious mechanism for addressing these concerns would be for the mediator to adopt a mechanism for analyzing the complete litigation picture, including all of the stages the parties believe could be components of the suit. While this approach is potentially burdensome, a mediator could be process-transparent in it without risking misattributions by the parties. For an example of such a process, see Hoffer, *supra* note 44, at 120–123, 134–137.

settle?" By using this kind of open question, the mediator avoids directly suggesting that the party has not given the issue thought. However, she does invite him to share his thoughts with her in a lower-stakes environment. However, there is a risk that the party may misinterpret the mediator's question. For example, he may interpret the question to be a signal that the mediator suspects that the two parties will not settle ("Why else would she ask me that?"). Another risk is that the party may interpret the question as a suggestion that he has overestimated his BATMA. While nothing in the specific wording of the mediator's question suggests that the mediator is trying to communicate either of these things, many parties experience mediators as authority figures and expect them to play quasi-judicial roles. As hard as mediators may try to dispel these impressions, such preconceptions often impact parties' perceptions. By not being transparent about motivations and expectations, mediators run a greater risk of misinterpretation by some parties. Despite these risks, however, many mediators adopt these, or similar, nontransparent approaches when addressing parties whom they suspect have not considered their BATMAs.[57]

While nontransparent approaches to BATMA-checking are more common, it is possible for a mediator to engage in impact-transparent efforts as well. An example of such an approach would be for a mediator to say:

> I'm concerned that you may not have considered what you will do if you two don't arrive at a settlement today. This seems important, because I assume that you'll compare anything you can get through settlement with whatever it is you expect to get if there is no settlement. Obviously, you can't make that comparison if you don't know what you'll do if there's no

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[57] There are similarly simple, nontransparent approaches available to mediators who believe that a party has misestimated his BATMA. For example, a mediator in a court-annexed mediation could ask, "What do you think the court will do with your case if you don't settle this?" Again, the benefits of nontransparency in BATMA-checking stem from the question's simplicity and openness. As with the earlier example, however, there is some risk that the targeted party will misinterpret the statement more broadly than the mediator intends. For example, a party may ask himself, "Why is the mediator asking me this? Does she think I've overestimated my BATMA? Underestimated it? Does she think this is heading back to court?" Nontransparent open questions are usually effective at generating further discussions because they are not at all restrictive. However, they may also foster misunderstandings and misattributions in the parties.

> settlement. I would like you to be confident in your assessment of your nonsettlement alternatives. What do you think a court would do with this case?

Like the nontransparent approach, this statement invites the party to consider his BATMA explicitly. However, it differs because it makes explicit for the party the mediator's motivation for asking the question and the impact that the mediator hopes to have on the party. This impact-transparency may not remove all risk of misattributions by the parties, but it offers the parties one plausible motivation for the mediator's question.

V. IMPACT-TRANSPARENCY

A. *The Three Kinds of Impacts Created by Mediators' Actions*

Impact-transparency is more complex than process-transparency or nontransparency. Impact-transparency is effective with some tasks, questionable with others and clearly risky with still others. In examining this phenomenon, therefore, it is inappropriate to formulate general observations or prescriptions about the use of impact-transparency. What may be true for impact-transparency with respect to one task is often not true for others. This complexity stems primarily from the fact that there are three fundamentally different *kinds of impacts* that mediators may seek to create with their efforts. One kind of impact a mediator may seek to create relates to the parties' *behavior.* That is, a mediator may engage in a particular task, hoping to directly affect parties' subsequent actions. A simple example of impact-transparency targeting parties' behavior is found in some mediators' "groundrules." For example, a mediator might say to a party:

> I'm going to ask you to stop interrupting the other party while he is talking. I would like to hear what he has to say, and I'm hoping you'll listen as well. I assure you that you'll get a chance to talk, and if it helps, I invite you to take notes while he is talking.

With this statement, the mediator is very clear with the targeted party about the behavior she wishes to see in him. A more complex example of impact-transparency focused on parties' behavior arises when a mediator tries to get the parties to generate creative options. For example, a mediator might say:

> I'm going to ask you to try to develop a list of different ideas for addressing these issues. My hope is that you will feel unconstrained in your creativity, because I think you would all benefit from a lengthy list of creative options, even if some of them are ultimately deemed unworkable. I'd like you to generate options, rather than evaluate or decide among the existing ones. Do you have any creative options you might suggest?

As noted in the discussion below, not all approaches to encouraging creative option generation are impact-transparent. If a mediator chooses to be transparent about impact with this task, however, she will be discussing the parties' *behavior* because that is the kind of impact the *task* targets.

A second kind of target impact for mediators is the parties' *analysis*. Efforts aimed at parties' analysis seek to change the way the parties think about or assess the merits of the issues in dispute. For example, when a mediator discusses her BATMA-checking in an impact-transparent way, she is actually asking the parties to rethink the way in which they have been analyzing their case. The mediator is not encouraging the parties to take any particular, specific, visible action when she says, for example:

> I'm concerned that you may not have considered what you will do if the two of you do not arrive at a settlement today. I would like you to have a solid assessment of your no-settlement alternatives before you make final decisions about settlement. To that end, what do you think a court would do with this case?

Instead, she is asking the parties to recalculate the variables they had been using in assessing the overall nature of their dispute. A second example of impact-transparency focused on analysis comes from many mediators' efforts to elicit parties' interests. An impact-transparent mediator working with a party who has put forward an extreme position might say, for example:

> I'm hoping that I'll be able to help you think about this problem differently because I think it would help move the mediation forward. I understand the position you have put forth, and I'd like to focus your attention on the concerns that underlie that position. It sounds as if you're concerned about the timing of the payments and about some kind of guarantee that you will receive them. Do you have other concerns as well?

In doing this kind of explicit interest searching, the mediator is trying to change the way the party thinks about the genuine issues in dispute and

the way progress is measured in the transaction. If a party conceives of the negotiation as zero-sum, then the only thing he will consider a sign of progress is a concession. A different analysis takes shape if the mediator convinces the party to instead consider the degree to which different options satisfy that party's interests. In the example above, the mediator is hoping that her statement will leave the party better positioned to consider the merits of various settlement options than he would have been prior to her intervention.[58] This kind of impact-transparency, therefore, does not aim to induce a specific behavior in the target party; instead, it is designed to affect the way the party analyzes the conflict, options for settlement and alternatives to settlement.

The third kind of impact relates to parties' *perceptions*. Tasks that are focused on parties' perceptions seek to change the basic way parties conceive of the dispute, each other and the mediator. For example, a mediator trying to demonstrate empathy in an impact-transparent way would necessarily describe a shift in perception. She might say:

> I'd like you to feel heard and respected. I'd also like you to feel comfortable moving away from your current, highly confrontational perspective on this problem to one that would allow us to jointly go forward. It sounds as if this has been a frustrating set of circumstances, and I imagine that it may be difficult for you to talk about it.

In this case, the mediator is clear that she wants both to change the party's perception of the overall dispute and to reinforce the party's perception that the mediator recognizes and respects the party's perspective on the problem. A second example of a task whose impact targets the parties' perceptions is described below as "framing." An impact-transparent approach to framing the opening of a mediation might sound something like:

> I'd like to have you both understand our collective task the same way. Rather than thinking of this as a competition or process of making concessions, I'd like you to think of this mediation as an opportunity for you to better understand the situation which brought you here and to explore possible ways of addressing it.

In this case, the mediator is clear with the targeted parties that she would like for them to conceptualize or perceive the endeavor differently

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[58] *See* discussion *infra* Part V.C for issues related to eliciting interests.

than they had previously. These statements are neither designed to promote a specific behavior in the parties, nor to encourage the parties to change their analysis of their negotiation options or alternatives. Instead, these statements attempt to change the way the parties conceptualize or perceive information relevant to the mediation.

Every mediator task seeks to create an impact. What is important for purposes of understanding impact-transparency is that different tasks target different *kinds* of impacts. The effects of impact-transparency depend on whether the task targets the parties' behavior, their analysis or their perceptions. The following sections consider one example of each kind of task and illustrate the effects of impact-transparency on each of them.

B. *Impact-Transparency with Tasks Targeting Behavior: The Example of Option Generation*

1. *The Role of Option Generation in Mediation*

In seeking to understand the negotiation dynamics between parties, it is useful to distinguish between alternatives (those things which one party can do without the consent of the other party) and options (those things which would require the consent of the parties before taking effect).[59] An economically rational negotiator would agree to an *option* or an option package only if it were better than his best *alternative*.[60] Mnookin, Peppet

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[59] Not all scholars have adopted this way of distinguishing between things that parties may do with and without the other party's consent. For example, Ronald Howard includes under the category "options" both those things that the parties might agree to *and* steps one party might take in advance of, or in lieu of, a negotiated agreement (for example, like researching the issue more). He distinguishes between these two by calling the first "contractual options," and the latter "non-contractual options." *See* Ronald A. Howard, *Options*, *in* WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 81-83 (Richard J. Zeckhauser et al. eds., 1996). Under the terminology adopted by this article, a noncontractual option would be considered an alternative.

[60] *See* RAIFFA, *supra* note 47, at 45. In analytic terms, a negotiator would accept an offer only if it were superior to the reservation price he established for himself. The parameters of a zone of possible agreement are the parties' reservation prices, not their BATNAs. A party's reservation price is what he would be willing to accept in this transaction, while his BATNA represents what he would do in the absence of this transaction. For more on the distinction, see generally Sally Blount White & Margaret A. Neale, *Reservation Prices, Resistance Points, and BATNAs: Determining the Parameters of Acceptable Negotiated Outcomes*, 7 NEGOTIATION J. 379 (1991).

and Tulumello describe this dynamic by referring to "two tables" at which all negotiators must sit and make comparisons.[61] At the first table, a negotiator considers how beneficial or costly it would be to agree with the other party on an option. At the second table, he considers how beneficial or costly it would be not to settle the dispute and instead exercise his BATNA.[62] A mediator should encourage each party to make this comparison between the best option on the table and his best alternative. Mediators generally respond to this two table dynamic by spending time both helping the parties to develop attractive options and checking their assessments of their alternatives.

Effective option generation is the mechanism by which parties can create value within the context of their negotiations.[63] In most transactions, parties have varying interests on a number of issues. Those varying interests can provide an opportunity to exploit potential gains.[64] The degree to which an agreement is efficient is one measure of how well-crafted it is. A good agreement under this construction is one in which no value has been left on the table, i.e. no party could have been made better off without

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[61] *See* Robert Mnookin et al., BARGAINING IN THE SHADOW OF THE LAW: HOW LAWYERS CAN CREATE VALUE IN NEGOTIATIONS (forthcoming 1998) (manuscript on file with author).

[62] *See id.*

[63] Negotiators do not always create value within the context of their discussions. In some cases they destroy value, and in others, they treat the value in question as fixed. If a transaction is purely zero-sum (meaning the total value is fixed), option generation may not play an important role in the development of the negotiations. For example, if the *only* issue in question is the amount of payment between buyer B, who has offered $10, and seller S, who has demanded $100, and if all other aspects of the payment are for some reason fixed, developing options would simply amount to a recitation of all possible dollar figures in the range between $10 and $100. Neither party would be better off for having counted from ten to one hundred. The dynamic would still be a linear one in which there would be an agreement only if there was a zone of possible agreement and the parties arrived at a figure within that zone during their bargaining. More likely than this listing of options would be a "proposal-counterproposal procedure" in which possible options are treated "as total packages requiring yes or no responses." MOORE, *supra* note 14, at 251.

[64] If the same buyer B and seller S are in a transaction without the restrictions noted above, they may be able to structure a deal contingent on inspection, with payments to be made over a period of years, with an adjustable interest rate and with a buy-back option after a number of years. One can imagine that an elegant option like this might be constructed such that each party would prefer it to an agreement that merely involved a one-time exchange of money for property.

taking benefit away from the other party.[65] In simplified, zero-sum negotiations, the range of options may be limited to a single continuum of numbers. However, most negotiations exploring multiple options reveal the presence of more complicated interests and settlement ranges with nonlinear valuation.[66]

Understanding the importance of options to dispute resolution and value creation, mediators must consider what processes to use to encourage the parties to develop creative options. However, there are difficulties for mediators who seek to encourage this behavior in parties. First, parties often enter mediations expecting purely distributive or positional bargaining sessions. In this context, requests from mediators for creative options are often heard by the parties as requests for concessions.[67] Second, the parties may be unwilling to accede to an unknown process. In an effort to compensate for this, many mediators explicitly ask parties to engage in brainstorming. While many mediators use the term "brainstorming," there is no uniformity even among scholars regarding what that process entails. It is understandable, therefore, that merely naming a nonspecific process does not alleviate all of the parties' concerns.[68] Third, parties may also fear that their proposed options will be criticized.[69] If the process of creating options becomes entangled with the process of evaluating options, the latter will

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[65] While clearly championing efficient agreements, Howard Raiffa cautions against taking this principle too far, noting that the integrity of the process used to reach agreements and the equity of the ultimate distribution of value are also relevant in evaluating a mediated agreement. *See* RAIFFA, *supra* note 47, at 231–234. Note also that the measurements of efficiency do not necessarily reflect the degree to which the disputing parties acted cooperatively. *See* Dana R. Clyman, *Measuring Cooperation in Negotiations: The Impossible Dream*, *in* WISE CHOICES, *supra* note 59, at 388–396.

[66] *See* MOORE, *supra* note 14, at 274–275.

[67] The parties' perceptions that this is a request for concessions is the primary difficulty with completely nontransparent requests from mediators with respect to option generation. For example, a mediator could say something nontransparent like, "What ideas do you have for addressing these issues?" This kind of statement gives the parties no particular reason to engage in anything other than a proposal-counter-proposal procedure. *See* MOORE, *supra* note 14, at 251.

[68] By naming the process she intends to adopt, the mediator in this case probably believes that she is being process-transparent. Unfortunately, because the process is not genuinely clear to the parties, the mediator does not create any of the potential benefits of process-transparency.

[69] Note that this fear of criticism can exist even when parties have explicitly precluded the possibility of commitment to any particular option at this stage.

almost always shut down the former, resulting in few new options.[70] Finally, parties may sometimes feel inhibited from suggesting options out of a legitimate fear that they may be associated with that option at a later date. Mediators trying to encourage option generation by the parties must understand that these pressures may exist and take steps accordingly.

2. *Impact-Transparency in the Context of Option Generation*

Mediators may choose to be impact-transparent with parties as they facilitate option generation. This would involve telling the parties about the behavior they hope to encourage. For example, a mediator might say to the parties:

> I think it would be helpful for each of you to spend some time thinking about different kinds of approaches to addressing these issues. I'd like to see you generate a lengthy list of options because I think you would both benefit from some creativity in this context. Rather than worrying about workability at this stage, I'd like to see as much variety as possible. What kinds of ideas do you have for addressing these issues?

This kind of approach to encouraging option generation is designed to assure the mediator that the parties understand what behavior she is asking them to adopt (generating a list of creative ideas), though she is not clear about what specific process she is proposing. In some contexts, clarity about desired behavior may be sufficient to motivate the parties to act. However, in other circumstances mediators may find that merely naming the behavior they would like to see is insufficient. Sometimes, parties will only adopt a particular behavior when they see a good reason to change behaviors.[71] One means of changing parties' behaviors is to provide a

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[70] This possibility is the reason for the recommendation that negotiators "separate inventing from deciding." *See* FISHER ET AL., *supra* note 48, at 60–62.

[71] Many mediators understand this resistance to changing behaviors. Unfortunately, many of the strategies mediators adopt for coping with the resistance are ineffective. For example, some mediators adopt a formula in which they name the pressures they imagine the parties might be feeling at that point and indicate what they hope the parties will feel instead. Some mediators say things like, "I am hoping to see you get creative now, so I don't want you to feel constrained from offering ideas. What kinds of ideas do you have for addressing these issues?" While the parties might feel some measure of comfort in knowing that the mediator understands that what she is asking is difficult or threatening, it is unlikely that this type of intervention would do anything to help ease

change in the parties' understanding of the incentives, risks and benefits of different kinds of behavior. However, this kind of understanding can only take place if the parties understand the context in which they are acting—namely, the process the mediator is employing.

Transparency offers a mechanism by which a mediator can communicate not only the roles she is asking the parties to play, but also the context in which she is asking them to play those roles. Statements about groundrules can compliment statements about expectations surrounding behavior because one reinforces the incentive to do the other. For example, a mediator adopting a process-transparent and impact-transparent approach could say:

> I'm going to ask you to try to develop a list of different ideas for addressing these issues. I intend to record every idea, but I will not be identifying anyone with a particular idea. At this point, I will ask you not to evaluate or criticize the options that are generated, and I will not ask any party to agree to or reject any of the ideas, even his own. My hope is that you will feel unconstrained in your creativity because I think you would all benefit from a lengthy list of creative options, even if some of them are ultimately deemed unworkable. What options might you suggest?

By precisely naming the behavior that is expected *and* by naming the process she intends to follow with the parties, the mediator may successfully remove the parties' legitimate fear that anything they suggest will be construed as commitments (either offers or concessions). Because the mediator has clearly outlined the steps she intends to take, she avoids the confusion sometimes created by simply giving a process a generic name such as brainstorming. Furthermore, this approach allows the mediator to address concerns regarding attribution of ideas and helps to disentangle option-generation and option-evaluation or commitment.

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the parties' concerns. In a sense, this is a bit like having a doctor say, "I don't want you to be scared by the procedure I'm about to perform on you. Now, please put on this hospital gown." Although the patient may be glad to know that his doctor appreciates his fear, the doctor has done little toward helping her patient actually feel less scared. In this example, the mediator has *not* been transparent about the *behavior* she hopes to see. Instead, she focuses her attention on attempting to name the parties' emotions. This is neither particularly effective empathizing nor is it a demonstration of effective impact-transparency.

C. *Impact-Transparency with Tasks Targeting Analysis: The Example of Interest Exploration*

1. *The Role of Interest Exploration in Mediation*

The concept of "integrative bargaining" has been part of dispute resolution literature for almost a century, and the notion of interest-based negotiation has enjoyed an explosion of popularity over the past two decades.[72] The well-known suggestion from *Getting To Yes*, "Focus on Interests, Not on Positions,"[73] serves to guide many mediators as well as negotiators.[74] In order to promote productive dialogue or to facilitate settlement,[75] mediators often find it helpful to have parties discuss in depth the concerns or interests that motivate them within the context of the dispute.

There are at least two reasons for which mediators may find interest-focused discussions more productive than position-dominated discussions. First, discussions of interests are often not characterized in oppositional or antagonistic terms. Positions tend to permit, and may in fact *promote*, simplistic thinking about a problem. Within a positional framework, it is easy for one party to view the other as wholly antagonistic. Discussions of interests add complexity to the situation because often parties will have some interests which are shared,[76] some which are mutually compatible,[77] and some which are opposed.[78] When parties recognize that complex and

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[72] *See* Albie M. Davis, *An Interview with Mary Parker Follett*, 5 NEGOTIATION J. 223 (1989).

[73] *See* FISHER ET AL., *supra* note 48, at 40.

[74] *See, e.g.*, MOORE, *supra* note 14, at 73; Alfini, *supra* note 6, at 67; Riskin, *supra* note 7, at 20.

[75] Recall that different mediators conceive of their mandates differently. *Compare, e.g.*, MOORE, *supra* note 14, at 17 (describing the mediator's task as promoting settlement by the parties) *with* BUSH & FOLGER, *supra* note 2, at 81–84 (characterizing the mediator's task as promoting a better understanding by the parties, not necessarily settlement).

[76] For example, both parties may have an interest in a speedy resolution of the dispute.

[77] One party may have an interest in keeping the agreement confidential, while the other may have an interest in making sure the agreement is legally binding. These are different interests, but they are not in direct opposition to each other.

[78] One party may want the agreement to have a short duration, while the other has an interest in a long-term contract. Similarly, one may want to maximize the payment,

multiple interests are implicated, it is more difficult for them to conceive of the problem and the process as single-dimensional and oppositional.

A second, and arguably more compelling, reason for mediators to encourage dialogue focused on interests is that an interest-focused process is most likely to create value for the disputants. As noted above, having multiple options facilitates the creation of value. The reason that multiple options are possible, however, is that parties have multiple interests implicated by the problem in dispute. If each party has only one relevant interest, and those interests stand in opposition to each other ("I want him to pay me the most money possible." versus "I want to pay him as little as possible"), no creative options can exist because there are no preferential differences to exploit. In many cases, parties have different interests relating to issues such as timing and risk. They may also differ on the degree to which they value information, flexibility and certainty. Each of these kinds of differences can be "exploited" in the best sense of the word to create value within a transaction.[79] Unless the parties are aware of these differences in their interests or preferences, however, they will be unable to harvest any of the potential value. Mediators, therefore, often see it as part of their role to bring the parties' interests to the surface.

There are a number of different ways in which mediators can seek to elicit parties' interests. Three common techniques include (1) the "Why" approach, (2) the "Why Not" approach and (3) the "Hypothesis" approach.[80] Each of these is described briefly below.

The Why approach to exploring a party's interests involves a very simple process of asking the party to reveal the concerns and interests that motivated him to put forward a particular position. In a very basic description of this kind of process, Fisher, Ury and Patton suggest that:

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while the other wants to minimize it. These interests are in opposition because satisfaction of one precludes satisfaction of the other.

[79] *See, e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

[80] There are clearly many more approaches to eliciting interests. For example, some mediators might simply ask a party a straightforward question like, "What do you really care about in this dispute?" Others might adopt a method of asking parties to indicate their preferences between different options (for example "Which would you prefer, option P or option Q? Option Q or option R?") under the theory that from the answers they would be able to discern those things that motivate the parties. This approach is described as "hypothetical modeling" by Christopher Moore. *See* MOORE, *supra* note 14, at 236–237. There are many other methods as well. The three methods chosen above are merely illustrative.

> You can . . . ask [the party] himself why he takes a particular position. If you do, make clear that you are asking not for justification of this position, but for an understanding of the needs, hopes, fears, or desires that it serves. "What's your basic concern, Mr. Jones, in wanting the lease to run for no more than three years?"[81]

An even simpler response to a party's statement of position is the basic question, "Why?"[82] The idea behind these approaches is that it is often very easy for a party to discuss the things that he wants, needs and fears. These kinds of questions invite the party to share his interests in a productive context. Despite this simplicity, there are a number of potential risks associated with the Why approach. If a mediator does not ask her questions carefully, for example, she may be inviting each party to become more firmly entrenched in his stated positions. Additionally, some parties believe it to be to their strategic benefit not to reveal their interests to the mediator or to the other party.[83] Furthermore, the risk exists that parties will not have considered their own interests, and instead have merely come to the table with positions.[84] In any of these cases, mediators must go beyond the Why approach in order to produce productive discussion.

A second approach to eliciting a party's interests is the Why Not approach. A mediator employing this approach asks a party to criticize or evaluate the merits of an option that may or may not have been discussed up to that point in the negotiations. For example, a mediator might ask one party, "What would be wrong with making payment contingent on the sales figures?" or "What concerns of yours would not be met by an agreement to pay over a series of months?"[85] The basic idea behind this approach is that

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[81] FISHER ET AL., *supra* note 48, at 44. Note that this formulation of the mediator's statement is nontransparent. The mediator says nothing about the process she is using nor about the impacts she is hoping to create in Mr. Jones or the other party.

[82] It is difficult to imagine how a mediator could construct a more thoroughly nontransparent intervention than the simple question, "Why?"

[83] *See* MOORE, *supra* note 14, at 232–233, 238–240.

[84] Christopher Moore suggests that parties' lack of awareness of their own interests is one of the most significant challenges facing mediators who seek to uncover interests. *See id.* at 231–232. Moore also suggests that even when parties have some initial understanding of their interests, the process of positional bargaining can eventually lead them to equate their position with their interests. In effect, it causes them to forget their interests and focus only on their position. *See id.* at 233.

[85] Note that both of these statements are completely nontransparent. Upon hearing these statements, a party could not be certain of what kind of reaction the mediator

while it may be difficult for parties to affirmatively offer information about their interests or about preferred options, it is often easy for them to criticize. In many regards, this process lies at the heart of the "Single Negotiating Text" or "One-Text" process used by some mediators.[86] When using the One-Text approach, the mediator creates an initial discussion draft of an agreement, making it clear that neither party is being asked to commit to the draft. In fact, the mediator often makes it impossible for a party to commit to the first draft by leaving parts of the draft incomplete. Instead of asking for acceptance or refusal, the mediator asks the parties what they think is wrong with the draft. In effect, the mediator asks the parties to identify those interests which the draft does not satisfy. Armed with the information gleaned from the parties' reactions to the first draft, she can take the draft, revise it and return it to the parties again in search of criticism. The mediator continues this process of revising the single text until she no longer believes that she can make the draft any better. At that point, she asks the parties to accept or reject it in its entirety. Until that moment, the parties have been asked only to criticize the text, answering the basic question, "Why Not?"[87]

A third process a mediator might use in trying to better understand a party's interests is to offer hypotheses about the party's interests, based on earlier statements by the party, and then give the party a chance to correct her. For example, a mediator might respond to a party's statement of position by saying, "It sounds as if you're concerned about the timing of the payments, the certainty of the payments and the fairness of the amount. Do I understand you correctly?"[88] Moore calls this process "testing," and

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expects from him ("Am I supposed to accept this suggestion? Criticize it? Suggest a different one? Just think about it?"). Furthermore, a party cannot discern from this statement what process the mediator is following ("Is this her only suggestion? Is she going to keep suggesting options until I find one I like? Is she looking to me for a different option?"). In promoting a genuine change in the way the parties analyze the dispute, mediators may find it necessary to provide more clarity to the parties on these issues.

[86] For a discussion of the Single Negotiating Text or One-Text method, see FISHER ET AL., *supra* note 48, at 112–116; RAIFFA, *supra* note 47, at 211–217.

[87] For a very brief illustration of how the Single Negotiating Text process was used in the Camp David negotiations, see RAIFFA, *supra* note 47, at 205–210.

[88] Note that this is a nontransparent construction of the Hypothesis approach. The mediator has not mentioned that she intends to reframe the party's position in terms of interests and then feed it back to him. She has also not indicated that she is hoping that this will affect the way the party and the mediator come to understand the party's true

suggests that it "requires a negotiator or mediator to listen carefully to another negotiator's statements and then to feed back the interest that he or she hears expressed. Through trial and error, the listener can gradually gain an understanding of the other negotiator's needs."[89] If the parties are already thinking and talking in terms of their interests, the Hypothesis approach serves to categorize or organize parties' statements. However, the Hypothesis approach is often most useful in cases where parties are engaging in positional bargaining, do not value discussion of interests or do not have sufficient trust to move beyond a discussion of positions.[90]

2. *The Impact-Transparent Approach to Interest Exploration*

The impact a mediator targets when she asks parties to identify their interests is one of *analysis*: the mediator is hoping to get the parties to change the way they consider or value the issues in dispute. The shift from thinking about the dispute in terms of positions to one based on the satisfaction of various needs or concerns is a significant one, but it may not manifest itself in any particular behavior. In contrast to tasks that focus on changing the behavior of a given party (like the example of generating options, described above), the most important impacts of interest exploration may or may not be visible. Success for a mediator engaging in interest exploration can involve nothing more than a recognition by one or more of the parties that a particular position is not an end in itself, but rather a means to satisfying some other concern.[91] This represents an important shift in the way parties analyze their circumstances within the dispute.

With each of the three basic interest-exploration methods described above, mediators could choose to be impact-transparent. For example, a

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motivations within the context of the mediation.

[89] MOORE, *supra* note 14, at 236. Moore's commentary implies that the party has only one interest that must be uncovered. However, in most cases, parties have a complex set of multiple interests, and no single statement of an interest can accurately describe their motivations. *See* FISHER ET AL., *supra* note 48, at 47–50.

[90] *See* MOORE, *supra* note 14, at 234.

[91] Compare this with option generating. With option generating, it is not successful for a mediator to simply have the parties recognize abstractly that there may be other creative ways to address the issues in dispute. In that case, the mediator is actually looking for a visible action, a behavior—naming one or more of these yet unspecified creative options.

mediator using the Why approach could respond to a party's statement of position by saying:

> I'd like to find a way for you to assert your needs and concerns in a way that is likely to advance the mediation. I don't think that a process of demands and counter-demands is likely to get us anywhere. Can you help me understand why the duration of the lease is important to you?

The impact named by the mediator in this case (helping the party to productively "assert [his] needs and concerns") is not inaccurate. A mediator making this statement is almost certainly aiming to produce that effect. At the same time, the statement does not capture the complete motivation of the mediator. Such a mediator is almost certain to understand that changing the way the party articulates what he wants is most effective only if it corresponds to a change in the way he conceives of what he wants.[92] Yet, mediators are not often fully transparent about that precise impact. A fully impact-transparent mediator could say something like:

> I'm hoping that you'll change the way you're thinking about your demands. Right now, you seem to be fixed on the idea that there is only one way you can be satisfied in this dispute, and that seems unlikely to me. I think it would be more productive for you and for this process if you (and the rest of us) were better able to understand the things that are motivating you to make these demands. Why is the duration of the lease important to you?

One of the reasons for mediators' reluctance to be this transparent is that the message sent is a very delicate one. There is a risk that parties will hear the mediator to be suggesting that the targeted party's position requires changing because it is somehow illegitimate in the eyes of the mediator. Another risk is that parties may not understand the impact of changing their analysis. This uncertainty can motivate parties to resist the request or to try to engage in strategic behavior that is inconsistent with settlement-

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[92] Successful interest-exploration must go beyond a simple, semantic shift in behavior by the parties. Moving a party from saying, "It is my position that the lease should run for at least three years," to "I have an interest in the lease running for at least three years," is not enough. If such a party were able to shift to something like, "I want to make sure there is long-term stability," the most important component would not necessarily be the articulation of that interest, but rather the change in the speaking party's analysis regarding how to measure what would and would not be appropriate resolutions to the situation.

promotion *or* increased understanding between the parties.[93] Despite these risks, impact-transparency can serve to help mediators make the most of the Why approach to interest exploration.

In very similar ways, a mediator using the Hypothesis approach may find benefit in impact-transparency. Faced with a party who says, "I've got to have a check by the end of next week, or else," a mediator could respond in a number of ways, including with an impact-transparent approach.[94] An impact-transparent approach might look something like:

> That's one way of thinking about this dispute, and I'm hoping that you and the rest of us will be able to come to a fuller understanding of exactly why that particular condition is important to you. Can you say more about what is important about the timing of the payment?

As with the Why example outlined above, there is some risk associated with the mediator explicitly asking the party to change a fundamental aspect of his conception of the situation. At the same time, there may be a benefit to having the party understand that the mediator believes that this kind of shift is necessary.

For mediators who use the Why Not variation of interest exploration, there is a clear application for impact-transparency, particularly when it is used in combination with process-transparency. One risk of the Why Not method, as with the Single Negotiating Text or One-Text processes, is that parties may misunderstand the task they are being asked to undertake. Parties who are used to traditional, positional bargaining may view the mediator's suggestion or draft as one more offer, and they are likely to respond in one of two ways, both of which are unhelpful to a person seeking to implement a Why Not process. They would likely either (1) reject or accept the draft outright or (2) suggest the specific language that they would find acceptable. Neither of these responses gives the mediator

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[93] Parties often enter mediation sessions fully expecting that the game will be one of positional haggling, and they are, therefore, prepared for just such a game. When a mediator asks them to play a different game, with an unknown outcome, they may try to play it using the same tactics they had planned for the haggling game.

[94] A nontransparent example of the Hypothesis approach would be something like, "It sounds as if you're concerned about the timing of the payments." A process-transparent approach could be something like, "I'd like to share what I take to be your real concerns in this case. Please correct me and help me understand if I'm not right. From your demand, it sounds like you are concerned about the timing of the payments. Is that right?"

the kind of interest-related information she is seeking. One approach to impact-transparency with the Why Not process would be something like:

> I'd like to find a way for you to identify your interests for me, without being concerned about making commitments or locking yourself in. What interests of yours would not be satisfied by a resolution that looked something like this draft?

While it is possible that the targeted party will somehow feel more comfortable articulating his interests following such a question, there is considerable risk that he would simply repeat his demands. Impact-transparency alone, without any mention of the process the mediator is intending to follow, provides the party with no particular *reason not* to feel concerned about commitments or locking himself in. However, an approach that is transparent on impact and on process addresses that concern. For example, a mediator could say:

> What I'd like to do is show you a draft I've created. It's not a complete draft, and I'm not looking for a commitment from you either for it or against it. I'm hoping that you'll look it over and that you'll be comfortable telling me what interests of yours it fails to address. I'll be showing the same draft to the other party and asking him to comment as well. I'll then revise the draft and return for more feedback from you. I don't want you to feel like you're locking yourself into anything right now. I won't be asking you to say yes or no until I can't revise the draft usefully any further.

This kind of transparency on the mediator's process may assuage some of the reasonable concerns of the parties involved.[95] Furthermore, because the mediator's motivation for adopting this process (namely the impacts he hopes to create) are transparent, a party may be more likely to provide the kind of interest-related information the mediator is seeking.

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[95] A short description of the One-Text Procedure created at the Harvard Negotiation Project suggests that this kind of process-transparency "gets everyone on board with how [they] will negotiate and avoids misunderstandings." Sheila Heen et al., The One Text Procedure 1 (1995) (unpublished manuscript on file with author).

D. *Impact-Transparency with Tasks Targeting Perception: The Example of Framing*

1. *The Role of Framing in Mediation*

Mediators often talk of "framing" as an extremely important task, but there is no uniform definition of framing within mediation literature.[96] At the heart of most definitions is a recognition and an acceptance that none of us can successfully or objectively process *all* of the information or data that we observe. As a result of this inability, we all filter certain information, conjure up possible comparable information and arrive at conclusions only after being influenced by our existing notions of what is true. None of us is a blank slate, and none of us can expect to evaluate each incoming piece of observable data independently. Instead, we build up "deeply held internal images of how the world works" and use those to process incoming information.[97] "[W]hether people notice problems, how they understand and remember problems, and how they evaluate and act upon them" is affected by the frame they are using.[98] The act of framing, then, is the process of sharing with others one's own view of the appropriate way to process a given set of information, in the hopes that it will affect how they interpret or understand the situation.[99]

Understanding the impacts of framing is important for negotiators because competing or different frames can account for the existence or perpetuation of a number of kinds of disputes. To illustrate this in a clinical setting, one psychologist took a game based on a prisoner's dilemma and gave half of the participants instructions under the heading "The Community Game."[100] The other half of the room was given a copy of the

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[96] *Compare, e.g.*, Ross, *supra* note 45, at 41 (suggesting that in mediation, framing is most useful as a means of overcoming psychological phenomena such as reactive devaluation) *with* PAUL WATZLAWICK, THE LANGUAGE OF CHANGE 119 (1978) (suggesting that framing is the process of developing a second-order reality from a first-order reality—for example, having a glass which is either "half empty" or "half full").

[97] SENGE, *supra* note 45, at 174.

[98] GAIL T. FAIRHURST & ROBERT A. SARR, THE ART OF FRAMING: MANAGING THE LANGUAGE OF LEADERSHIP 4 (1996). *See also* R.M. Entman, *Framing: Toward Clarification of a Paradigm*, J. COMM. 43, 51–58 (1993).

[99] *See* FAIRHURST & SARR, *supra* note 45, at 3.

[100] *See* Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* VALUES AND KNOWLEDGE 103 (Edward S.

identical game, but with the label "The Wall Street Game." By a significant margin, those playing The Community Game exhibited cooperative behavior, while the Wall Street players were competitive. The researchers did not affect behavior by changing the rules or incentives. Instead, they affected behavior by changing the participants' frames. In many real world contexts, competing frames account for the differing conclusions of disputants.[101] If the two sides to a dispute view the problem from different frames, it is not surprising that they often see different actions as appropriate.

Because some frames are more likely to produce productive dynamics than others, mediators often find it very useful to offer one frame over another. This process of framing takes place in at least two different contexts within mediation. First, mediators often find it useful to offer an initial framing for the entire mediation endeavor. With such a statement, mediators hope to create a common mindset or frame for the participants about the purposes and roles involved in mediation. For example, Christopher Moore suggests that a mediator might begin a mediation session by saying, "I would like to congratulate you both for coming here today and trying to reach your own agreement on some issues that may have been hard in the past to discuss."[102] While Moore does not explicitly acknowledge the frame involved in this statement, there is clearly one offered here: that of problem solving. The parties are invited to think of this endeavor as one in which their purpose is to try to reach an agreement.[103] The parties might react differently to subsequent information

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Reed et al. eds., 1996).

[101] For example, within the European Union, France and the Netherlands frequently engage in debates over appropriate drug policy. French delegates discuss "crime prevention policies," while Dutch delegates explain "public health policies." Interview with anonymous officials, Dutch Ministry of Justice (Sept. 23-27, 1996).

[102] MOORE, *supra* note 14, at 195.

[103] Moore's suggested approach illustrates the common tendency among scholars to treat mediators' roles in purely nontransparent ways. In his treatise on mediation, Moore explicitly acknowledges the importance of framing as part of a mediator's task. *See id.* at 155, 217-221. However, Moore's suggested introduction for mediators omits any mention of the framing aspects of mediators' jobs, saying only:

> My role as mediator will be to help you identify problems or issues that you want to talk about, help you clarify needs that must be met, assist you in developing a problem-solving process that will enable you to reach your goals, keep you focused and on the right track, and generally help you define a new relationship that each of you will find more comfortable and acceptable.

in the remainder of the session if the mediator instead started by saying, "We are here to mutually agree on how much the defendant owes the plaintiff." Robert Baruch Bush and Joseph Folger offer a third possible initial frame. They suggest an opening which includes a statement from the mediator such as, "I appreciate your willingness to come here today and try mediation—a process designed to help you better understand the situation and each other, and to help you decide how you want to handle the situation."[104] Any of these initial framings may have a significant effect on the way in which participants respond to subsequent information, either from the mediator or from the other parties.[105] As a result, most mediators carefully choose how they frame their mediation sessions.[106]

A second context in which mediators try to affect the participants' frames occurs during the process of "reframing." Reframing generally involves taking a statement or collection of information that has been offered and viewed in a particular way or through a particular filter and suggesting a different or refined manner of proceeding with that information. One common example of reframing occurs frequently when a party makes a highly emotional or inflammatory statement and the mediator seeks to neutralize it. Moore provides the following example of that kind of neutralizing reframing: "[W]hen one party says, 'That fat slob hasn't paid

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Id. at 196.

[104] BUSH & FOLGER, *supra* note 2, at 118.

[105] As Fairhurst and Sarr note:

> Mental models influence our goal-setting because the dimensions of our model direct what we pay attention to and what we ignore. Often our models set up an ideal, a standard, or an exemplary case that we use to compare against current circumstances. When we are reminded of our mental model in an attempt to understand a new situation, we formulate a goal congruent with our model if the situation matches our model. If we are reminded of a mental model, but the situation is not a perfect match for it, we still use the model but adapt it to the situation and set our goals.

FAIRHURST & SARR, *supra* note 45, at 38.

[106] In the prelude to a mediation, for example, a defendant might have a mental model of competitions. This might lead the defendant to articulate his goal as something like "beating the plaintiff by paying as little as possible." Through skillful framing, a mediator might suggest a different mental model, such as that of "solving a problem." In the carefully framed words of the mediator, listeners hear messages that are consistent with a mental model the mediator believes will be helpful, and many listeners will unconsciously shift their mental models because of these frames.

his rent money for the past two months,' the mediator may translates [sic] this as 'You are upset that you have not received money that you feel is due to you according to the terms of your rental agreement.'"[107] Another kind of reframing occurs when mediators look for ways to direct parties' attention away from their positions or demands in a search for objective criteria by which the parties might measure fairness.[108] For example, a party might enter a negotiation with a demand like, "I won't take a penny less than $10,000 to settle this case." A mediator might respond by saying, "Can you tell me where you got the figure $10,000?" Such a question would be designed to direct the party's mindset away from the dynamic of demands and counter-demands and toward a discussion of what an appropriate figure might be. This question neither indicates displeasure with nor approval of the number. Instead, it seeks to reframe the topic of discussion from positions to that of criteria.[109]

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[107] MOORE, *supra* note 14, at 222–223.

[108] For a brief discussion of the persuasive role of criteria in negotiations and mediations, see FISHER ET AL., *supra* note 48, at 81–94; MOORE, *supra* note 14, at 278–279. The persuasiveness of objective criteria and their role in even high-stakes, complex negotiations was illustrated recently in the negotiations between Turkey and the European Union over Turkey's entry into the EU. The Secretary General of the Turkish Foreign Ministry said, "If the EU presents objective criteria and says that the first countries which fulfill them will be the first to be admitted, we can accept that. . . . What is really unacceptable to us is if different standards, different criteria are applied to us than are applied to other countries." Stephen Kinzer, *Turkey Finds European Union Door Slow to Open*, N. Y. TIMES, Feb. 23, 1997, at A3.

[109] A mediator's interest in having the discussion reframed to one about criteria would be motivated by the hopes that a party who has been asked where he came up with his demand figure might respond by saying something like, "I'll tell you where $10,000 came from. That's the amount he promised to pay me, plus the penalty stated in the contract, plus interest, plus costs, plus $1000 for the headache he has caused me." In that case, a mediator would be well positioned to follow up with the parties on the appropriateness of *those* particular measures of fairness or criteria. It is likely that the other party will not be persuaded that those criteria are the most applicable, but the mediation has a much greater chance of progressing than it would in a demand-counter-demand dynamic.

2. *Impact-Transparency and Framing*

While mediation literature does not specifically address the question of transparency with respect to framing, its implicit assumption is that mediators will engage in framing without revealing anything to the parties about the intended impacts. Some of the concerns underlying this assumption are legitimate. For example, a mediator would not be very likely to produce the intended result by saying:

> What I'd like to do is to create an expectation in the two of you about what we're going to do today, and my hope is that by framing it as a joint problem at this initial stage, you'll both feel less inclined to immediately engage in strategic, value-claiming activities.

Similar difficulties could arise for unskilled mediators trying to respond to a party like the one Moore described as saying, "That fat slob hasn't paid his rent money for the past two months."[110] An example of an ineffective impact-transparent response would be something like, "Okay, what I'm hoping you'll each do is adopt a different mental model for processing subsequent dialogue." Not only does that sound intuitively unhelpful, but also there is some risk that by this point the party accused of being a fat slob will be attacking the first party verbally if not physically. Despite these concerns, it is possible for mediators to construct effective, impact-transparent approaches to framing.

Mediators who wish to use impact-transparent approaches to framing must recognize that framing works by offering the listener a mental model that is easy to adopt and that can help the listener process existing data or information.[111] One obstacle created by impact-transparent framing is that parties often do not perceive alternative mental models as attractive. For example, with the fat slob insult described above, the targeted party (the accused fat slob) is likely to have a mental model in his head of something like a verbal battle. Rather than launching into a description of mental models or cognitive and perceptive processes,[112] a mediator could describe

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[110] MOORE, *supra* note 14, at 222.

[111] *See* SENGE, *supra* note 45, at 174–175.

[112] An intervention naming only these aspects of the framing dynamic would be unlikely to produce favorable results. Instead, a typical listener would *hear* that he is being asked to submit to some unknown "framing thing" which is supposed to change his perceptive and cognitive processes. That is hardly an attractive prospect, and it has virtually nothing to do with the data or situation currently facing the party. As a result,

the frame she suspects is being used by the parties and be clear that she would like to see a shift to a different frame. For example, she could say:

> I suspect that solving this problem will require considerable creativity and effort by both of you, and I'm not certain we'll be able to accomplish much without a shift in the focus of these discussions. You may think that the best way for us to be spending our time right now is for you to lob creative insults at each other. I'm hoping that you'll think seriously about the kinds of comments and ideas that are likely to help us find an appropriate resolution to these issues.

With this kind of intervention the mediator has named, in a transparent way, the dynamic she sees going on between the parties, the frame she suspects one or both of the parties may have and the alternative frame she would prefer them to adopt.

E. *Understanding Impact-Transparency*

Being impact-transparent is easier for mediators in some circumstances than in others. A significant factor influencing the difficulty of effectively delivering impact-transparent approaches is the difference in the *types* of impact-transparency in question.[113] Mediators are likely to feel more comfortable being transparent about tasks that target behavior than they are about those targeting analysis. Furthermore, most would find it more difficult to craft effective impact-transparent approaches to tasks that target the parties' perceptions than either of the other two. To that extent, there may be a kind of hierarchy of comfort within impact-transparency.

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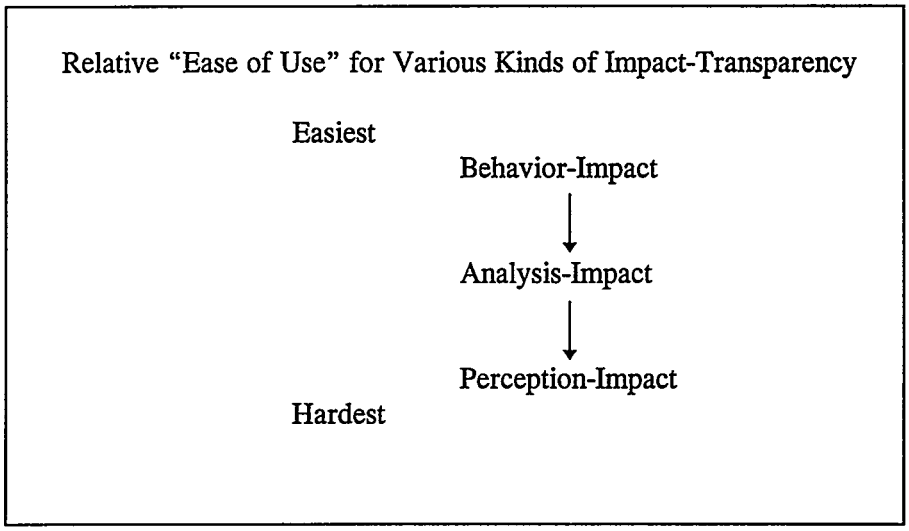
that party is likely to simply ignore the effort, or worse, suspect that the mediator is somehow in agreement with the accusation because she did not directly confront it.

[113] Mediators' individual styles also constitute a factor in this determination.



Whether something is easy to do should not be confused with the question of whether it is useful to do. For example, compare this progression of relative "ease" of impact-transparency with the double-loop-learning model developed by Chris Argyris.[114] Simplified, Argyris' basic argument is that people's assumptions drive the way they think about a particular problem. The way they think about the problem, in turn, affects the ways they will choose to act and those actions will produce results. This progression, *assumptions-thinking-action*, resembles greatly the hierarchy listed above, *perception-analysis-behavior*. It is interesting to note that changing the things which are easiest to change (behaviors or actions) tend not to be as impactful ultimately as changing the things which are more difficult to change (analysis/thinking or even perceptions/assumptions).[115] In practice, mediators may be able to change a party's behavior in ways that are productive for the purposes of a portion of the session. For example, a mediator may be able to get the parties to begin talking or to stop interrupting each other. It is a more profound, and arguably more impactful change, however, when mediators can help parties change the way they think about the problem they are facing,[116] each other,[117] or

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[114] *See* ARGYRIS, *supra* note 45, at 79–88.

[115] *See id.*

[116] An example would be moving a party from a mindset of "this is all about him paying me the money" to "this is about us figuring out a way to address these issues."

[117] For example, many parties begin mediations with significantly negative

themselves.[118] A mediator's comfort in adopting or attempting to adopt any of these levels of impact-transparency may not, therefore, be the only determinant in whether it is an appropriate course of action. In other words, although hard-to-accomplish transparency may be more difficult than easy-to-try transparency, it often will be the type of transparency which yields the greatest lasting impact.

VI. A MODEL FOR ANALYZING TRANSPARENCY

A. *The Need for Descriptive Categories of Transparency*

Transparency is not an on-off switch. There are many different ways in which a mediator can be transparent about her actions, and it is not simply a question of being transparent or not being transparent. Because this is the case, it would be difficult to do any useful analysis or research on the question of transparency without having a systematic way of categorizing different approaches to transparency.

Unfortunately, it is also too simplistic to posit that transparency can be plotted on a simple continuum ranging from Complete Non-Transparency to Full Transparency.

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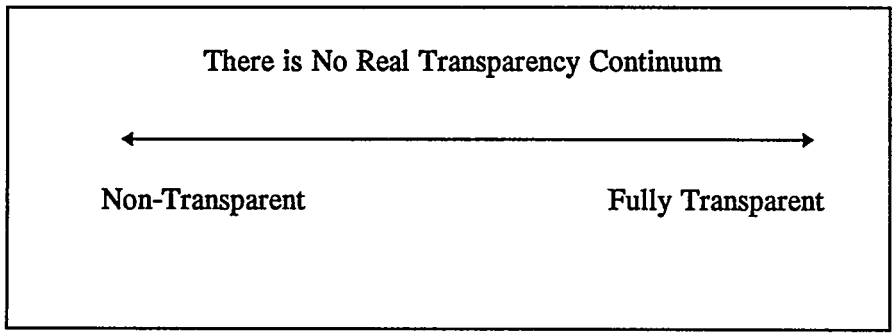
attributions toward the other party ("He is evil," "He is out to get me," or "He is entirely wrong here"). It is a significant transformation to move parties to the position of thinking instead of the other as a person with legitimate needs and concerns as well ("He and I have a problem we need to work out").

[118] This may be the most significant impact of all. Many parties arrive at court imagining that their problems will be solved by a third party. Generally, this solution takes the form of an imposed all-or-nothing decision. Not only does this often not address the real concerns of the parties to the case, but also it reinforces the parties' perception that they need the assistance—indeed, the strong intervention—of an outside authority in order to solve their problems. That process makes them less, rather than more, self-reliant. Some mediation scholars have argued that one of the strengths of mediation is that it can show parties that they have the capacity to solve their own problems. *See, e.g.*, BUSH & FOLGER, *supra* note 2.



Again, because there are different things about which mediators may be transparent, there is no way to plot transparency on a single axis. Is a mediator who is transparent only about her process more or less transparent than one who is only transparent about the impacts she seeks to create? The question has no clear answer, and the comparison is not helpful. In fact, such a question may obscure the more interesting and important questions relating to how, when, and why mediators make different transparency choices.

B. *A Model for Analyzing and Understanding Transparency*

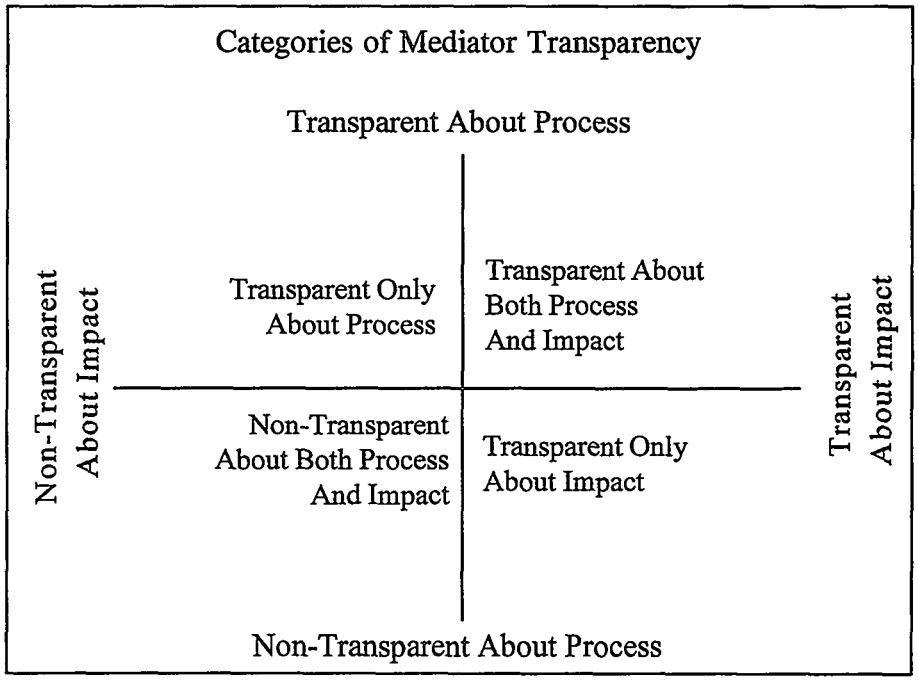
1. *Step One: Define the Task in Question*

While many have tried to reduce mediation to a simple definition,[119] in reality mediators perform a wide range of different tasks. In seeking to truly understand a mediators actions at any given moment, it is unhelpful to try to abstract the endeavor into its broadest form ("she is trying to promote settlement" or "she is trying to help the parties understand each other better"). This would be like telling medical students, "the doctor is trying to help the patient be more healthy," whether the doctor was performing surgery, doing an examination or prescribing a particular diet. Instead, those seeking to understand mediators' actions should try to define, as closely as possible, the sub-task the mediator is focusing on at that moment.

[119] *See, e.g.*, Riskin, *supra* note 7, at 13–16.

2. *Step Two: Determine the Level of Transparency About Both Process and Impact*

As noted above, regardless of the task in question, there are at least two different broad topics about which mediators may choose to be transparent: process and impact. A mediator's approach to transparency with any given intervention can be plotted on axes representing those two topics.

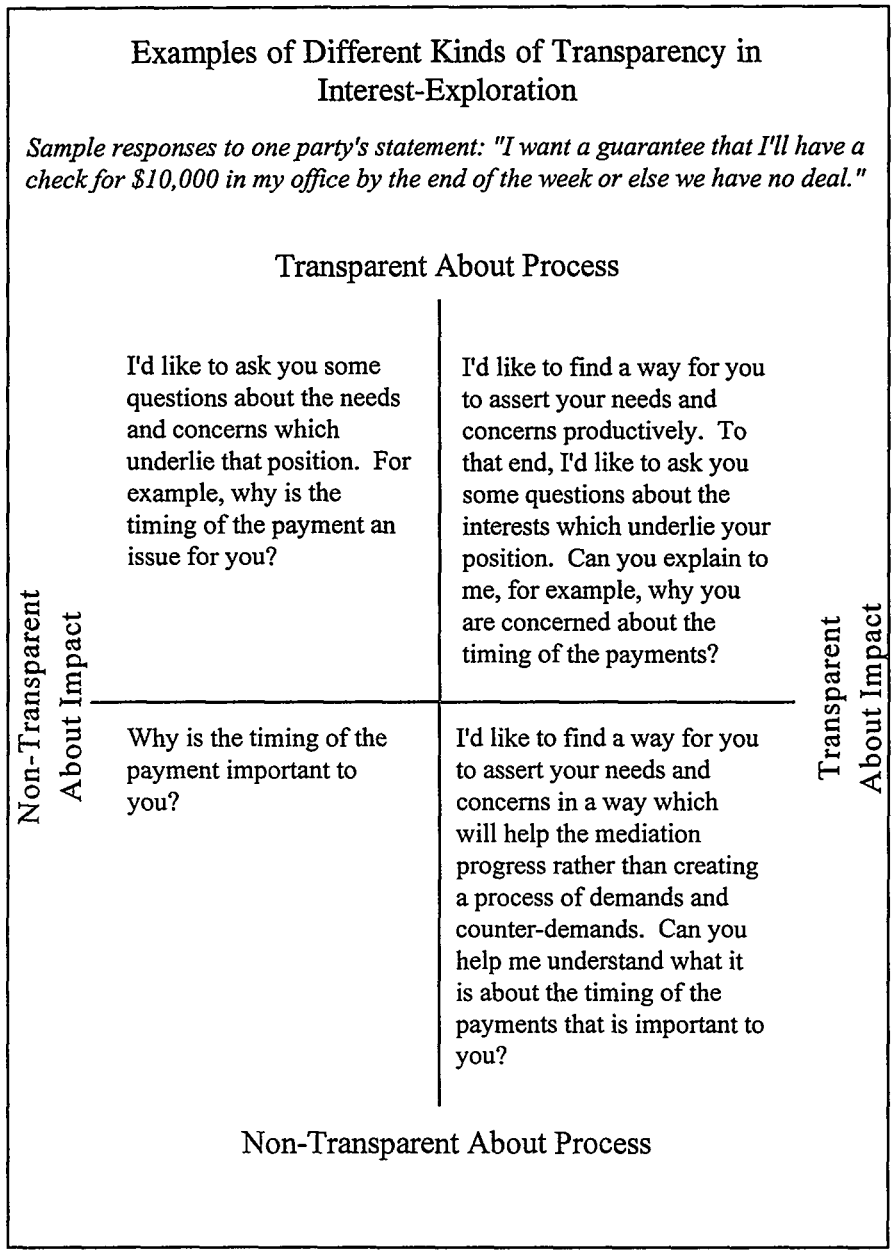


This kind of grid serves two useful purposes for those seeking to better understand transparency and its effects. First, it is possible to use the grid to more fully analyze a single mediator statement. Researchers could, for example, consider a single statement they observed and plot it on this grid as a means of coming to some hypotheses about the assumptions the mediator is making with regards to transparency. For any given statement, researchers would need to ask themselves at least the following three separate questions: (1) What specific task is the mediator hoping to accomplish at this stage with this intervention?; (2) In her statement, did the mediator communicate explicitly to the parties what steps or process she

intends to pursue with them next?; and (3) In her statement, did the mediator communicate explicitly to the parties the impacts or effects she hopes to have on the parties with her actions? Armed with the answers to these three questions, it would be possible to track patterns of mediator behavior in different contexts. Data from such an analysis would be tremendously useful in furthering understanding of a wide range of different mediation practices.[120]

A second application for this kind of analysis lies in training mediators. Most mediation training programs mention at least some of the different kinds of tasks or sub-tasks with which a mediator is often charged. Unfortunately, many mediation training programs, like many mediators, conceive of only a single way in which that particular task can be accomplished. By discussing different kinds of transparency, mediation teachers and trainers could expose mediators to a number of significantly different approaches to accomplishing the same task. For example, most mediation programs give *some* mention to the notion that there is a difference between positions and interests and that it is useful to try to explore interests. With a task like interest exploration, this framework makes it possible to consider a range of different approaches, depending on the kind of transparency used.

[120] For example, this data may permit researchers to pinpoint the causes of some of the variation in practice among mediators who claim to mediate under identical mediation models. Conversely, it could help scholars to identify practices that are common among multiple models or identify practices that are commonly shunned.


Examples of Different Kinds of Transparency in Interest-Exploration
Sample responses to one party's statement: "I want a guarantee that I'll have a check for $10,000 in my office by the end of the week or else we have no deal."
Transparent About Process
Non-Transparent About Impact
I'd like to ask you some questions about the needs and concerns which underlie that position. For example, why is the timing of the payment an issue for you?
I'd like to find a way for you to assert your needs and concerns productively. To that end, I'd like to ask you some questions about the interests which underlie your position. Can you explain to me, for example, why you are concerned about the timing of the payments?
Why is the timing of the payment important to you?
I'd like to find a way for you to assert your needs and concerns in a way which will help the mediation progress rather than creating a process of demands and counter-demands. Can you help me understand what it is about the timing of the payments that is important to you?
Transparent About Impact
Non-Transparent About Process

Each of these quadrants contains an illustration of a plausible mediator intervention. Some may appear intuitively more effective than others. However, it is important to note that this graph would enable a student of mediation to understand that there are multiple ways of accomplishing the task at hand, and that different circumstances may call for different decisions regarding transparency.

VI. CONCLUSION

The question of mediator transparency—when and how a mediator tells a party what she is doing and why she is doing it—has not been adequately addressed by mediation practitioners or scholars. Existing models of mediation generally do not make any reference to the decisions mediators face with respect to transparency, and the questions arise within virtually every model of mediation. The question of whether or not to be transparent or in what way to be transparent is not a static one to be answered once by a mediator, never to be considered again. Instead, those seeking to understand mediation thoroughly should recognize that there is no universal best level of transparency. It depends not only on the individual mediator and the circumstances surrounding the mediation, but also on the specific task the mediator is contemplating. It is entirely possible, and perhaps likely, that a mediator would be most effective by being nontransparent with some tasks, process-transparent with others and impact-transparent with still others. More research and analysis of the questions raised by the issue of mediator transparency could significantly benefit the practice of mediation. Even without more research, practicing mediators would benefit today from being more aware that different kinds of transparency exist and that mediators have various options at every stage of the mediation.